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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 399 17

EINAR RASMUSSEN, *Petitioner*

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia reversing a judgment of the District Court declaring that petitioner is eligible for American citizenship and is a permanent resident of the United States.

Opinions Below

The opinion of the District Court is unreported and is set forth at page 13 of the Appendix herein. The opinion of the Court of Appeals is not yet reported and is set forth at page 15 of the Appendix herein.

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the petitioner, a citizen of Denmark who claimed draft exemption as a neutral alien in 1943 upon the erroneous advice given him by his draft board and who subsequently volunteered for induction into the Armed Forces in the same year and prior to the Battle of the Bulge, was ineligible for American citizenship and hence an inadmissible alien in 1946 when he was granted permanent residence by the joint action of the State and Justice Department.

2. Whether by the mere signing of an application by an alien for relief from military service, the petitioner forfeited his right to naturalization and became ineligible for citizenship where it does not appear that he was actually relieved from military service as required by the law and the rules and regulations of the Selective Service System (32 C.F.R. 622.43b Cum. Supp., 1944 Ed.). This is the identical issue presented by *Ceballos* v. *Shaughnessy* (No. 71, October Term, 1956) in which certiorari was granted on June 11, 1956.

3. Whether the Court of Appeals properly construed the pleadings herein strictly against petitioner.

4. Whether the District Court properly concluded that petitioner herein was not a citizen of a neutral country and that he was therefore eligible for American citizenship.

Statutes Involved

The applicable statutes are set forth in Appendix A herein at page 11.

Statement

Petitioner is a native and citizen of Denmark and is the husband of an American citizen. His two minor stepchildren and his wife depend upon him for support. Petitioner came to the United States illegally on August 6, 1929. On April 26, 1943, he advised his draft board that he desired to serve in our armed forces if he could become an American citizen, otherwise he did not. He was erroneously advised by his draft board that because of his illegal entry he could not become a citizen by army service. He thereupon claimed exemption from service as a neutral alien pursuant to 50 U.S.C. App. 303(a). A few months later, on October 4, 1943, when the war was still raging and before the Battle of the Bulge, petitioner discovered that he could become a citizen by entering the armed forces. He submitted to induction and was rejected on physical grounds (R. 8).

In 1944 after the institution of deportation proceedings, petitioner was granted permission to proceed to Canada in order to adjust his immigration status pursuant to a procedure known as preexamination (8 C.F.R. 1949 Ed., Part 142). On January 16, 1946, an appropriate immigration visa was issued to him, and he reentered the United States as a permanent resident (R. 8). In 1947 the immigration authorities asserted that they made a mistake readmitting petitioner for permanent residence, that he was ineligible to citizenship pursuant to 50 U.S.C. App. 303(a), was therefore inadmissible for permanent residence under 8 U.S.C. 213 and was accordingly deportable. The present deportation order was entered on June 30, 1948, upon this theory.

Thereafter litigation followed which resulted in a determination that the issues herein could be litigated in a declaratory judgment action (350 U.S. 806).

The District Court ruled on May 14, 1953 that the petitioner was not subject to deportation, holding that as a citizen of a country which was not neutral, he did not incur the disability of citizenship ineligibility under 50 U.S.C. App. 303(a) (R. 12).

At the trial the petitioner offered to prove through documentary evidence that he had been induced to file his draft exemption claim in April 1943 under mistake and upon the advice of his draft board that he could not become an American citizen by serving in our Armed Forces (R. 45-46). As contended by the petitioner in his complaint and at the present trial, a few months later in October 1943 when petitioner discovered that he could become an American citizen, he offered to serve in our Armed Forces during hostilities and prior to the Battle of the Bulge. However, he was subsequently rejected on physical grounds. The District Court found it unnecessary to take evidence on the issue of mistake or to permit the petitioner to develop his case in view of the fact that judgment was rendered for the petitioner upon the ground that Denmark was not neutral.

Upon appeal the Court of Appeals ruled that the Selective Service determination regarding the status of Denmark was one which could not be attacked collaterally in the courts. It further held that the misinformation which the petitioner received from his draft board was not the type of mistake which existed in the case of *Moser* v. *United States*, 341 U.S. 41 (1951), and that therefore it was unnecessary to afford petitioner his day in court on this issue. It was further held that although the complaint asserted that the petitioner was not relieved from military service as a result of his application, that nevertheless since there was no definite offer to show that deferment from service was based upon another ground, the case would not be

remanded to ascertain the ground for deferment. Subsequent to the decision of the Court of Appeals on June 14, 1956, an order was entered on June 20, 1956 by the Court on its own motion staying the issuance of its mandate pending disposition by the Supreme Court of the case of *Ceballos* v. *Shaughnessy* in which certiorari was granted on June 11, 1956.

Reasons for Granting the Writ

1. The decision below is in conflict with *Moser* v. *United States*, 341 U.S. 41 (1951). In the instant case the petitioner offered to prove that he was lured into a misunderstanding of his right to apply for naturalization in the event of induction into our Armed Forces. He found himself in the position of an alien illegally in the United States who was faced with the possibility of entering our Armed Services, risking his life, and nevertheless being unable to obtain American citizenship. Three or four months later he discovered that he could become an American citizen by entering our Armed Forces, and prior to the Battle of the Bulge he offered to serve.

Where an individual has been misled or wronged by the Government officials, the courts have been free to hold that "the Government should always be a gentleman" and not take advantage of its error. *Strockstom* v. *Commissioner*, 190 F. 2d 283 (C.A.D.C. 1951); *Staten Island Hygenia Ice and Cold Storage Co.* v. *United States*, 85 F. 2d 68 (C.A. 2, 1936); *Uyeno* v. *Acheson*, 96 F. Supp. 510 (W.D. Wash. 1951); *DiGirolamo* v. *Acheson*, 101 F. Supp. 380-382 (Dist. of Col. 1951); *Moser* v. *United States*, 341 U.S. 41, (1951); *Hong* v. *Acheson*, 110 F. Supp. 60 (N.D. Calif. 1953); *Gay* v. *Brownell*, 120 F. Supp. 319 (D.C. Puerto Rico, 1954); *Rueff* v. *Brownell*, 116 F. Supp. 298 (D.C.N.J. 1953).

In *Strockstom* v. *Commissioner*, 190 F. 2d 283 (C.A.D.C. 1951), the Court of Appeals ruled:

> "It has been well said that the government should always be a gentleman. Taxpayers expect, and are entitled to ordinary fair play from tax officials. We regard as unconscionable the Commissioner's claim of authority to assess a tax in 1948 because of Strockstrom's failure to file a return for 1938, when the Commissioner himself was responsible for that failure."

In *Moser* v. *United States*, 341 U.S. 41 (1951), this Court found that the petitioner was understandably lulled into a misconception of the *legal* consequences of applying for exemption by the Government. It stated at page 47:

> "Petitioner did not knowingly and intentionally waive his rights of citizenship. In fact because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness."

Certainly the instant case presents the type of mistake which should be recognized under the *Moser* case. The petitioner looked to the superior intelligence of his draft board to advise him on the issues of the legal consequences of entering our Armed Forces. He was misadvised, and, accordingly, claimed draft exemption under mistake. Rules of elementary fairness which were applied in the *Moser* case should likewise be applied here. As noted by the Court below, this issue is not only involved in this case, but has been presented in other cases, and there is need for clarification as to whether or not the principle of the *Moser* case is to be narrowly and strictly construed, or

whether it is to be applied to situations like that presented herein.

2. On June 20, 1956, the Court of Appeals entered an order staying the mandate herein until this Court's decision in *Ceballos v. Shaughnessy*, No. 71, October 1956 Term. It was thereby recognized that the issue presented herein is similar to that presented in the *Ceballos* case in which certiorari has been granted. The complaint herein alleges and the answer admits that the petitioner applied for relief as a neutral alien and was thereafter classified 4-A (over-age). It would thereby appear that the petitioner was never relieved from military service upon the ground of alienage. Accordingly, the issue presented here is the identical issue presented in the Ceballos case. It is submitted for the reasons elaborated more fully in the *Ceballos* petition for certiorari that the petitioner, who claimed draft exemption in April of 1943 and subsequently attempted to enter the Armed Forces in October of 1943, was not barred from American citizenship by reason of the mere filing of the draft exemption claim.

3. The record herein does not support a conclusion that petitioner was in fact exempt from military service upon the ground of alienage. All that can be asserted upon the basis of the record is that the petitioner's military service was deferred at first because of his age, and later was excused because of his defective vision. The Court of Appeals, however, as indicated in footnote 3 of its opinion (Appendix B herein, page 18), contrary both to the record below and to the usual rules for the construction of pleadings, has construed the pleadings strictly against the petitioner. The Court below assumed without warrant that the petitioner would be unable to prove his contention that he was not deferred on grounds of alienage, but merely because of over-age, a fact which has been admitted by the

answer herein. In *Price* v. *Johnston*, 334 U.S. 266, 291 (1948), this Court observed:

> "Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed."

The decision below flies in the face of this admonition by this Court.

4. Under its regulations the Selective Service System was required to conclude that Denmark was neutral only where it appeared that the country was neither an enemy country nor a cobelligerent [32 C.F.R. 601.2(c); Cum. Supp. 1944 Ed.; 6 F.R. 6825; 7 F.R. 10802]. The District Court found that under the stipulated facts herein Denmark was not a neutral country. It appears that the State Department took no position on this issue. The Office of Military Government for Germany listed Denmark as a cobelligerent during World War II (Military Government Law No. 3, Title 23). Alien property cases likewise recognize the belligerency of Denmark. *The Rita Maersk*, 52 F. Supp. 56 (D.C. Mass. 1953). Denmark had been invaded by the German Army on April 9, 1940, and thereafter our Allies treated Denmark as a belligerent, seizing its ships on the high seas as enemy property. Moreover, in 1941, we took possession of Greenland and utilized it as a military base. Thus for all purposes other than Selective Service, the United States recognized the belligerency of Denmark.

Here we are concerned, not with a political question, but with the interpretation and application of an agency regulation having the force and effect of law. *U.S. ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). The Court of Appeals refused to decide whether the Selective Service System complied with its own regulations when it found Denmark to be neutral. Determining whether there has

been compliance with agency regulations is a normal and usual judicial function which the Court below improperly refused to undertake.

Moreover, the judicial self-limitation represented by the rule that courts will not normally decide political questions is based in large part on the necessity for unity of action in the conduct of foreign affairs. *Curtiss-Wright Corp.* v. *United States*, 299 U.S. 304, 319 (1936). However, when the political decisions of executive agencies are so diverse as in the case of Denmark's alleged neutrality, then there is strong reason for the courts to interfere, especially when the decision as to neutrality has no support in the circumstances. Neutrality implies a total abstinence from war and an impartiality of conduct toward belligerents. *The Three Friends*, 166 U.S. 1, 51, 52 (1896). No one who fully reviews the history of Denmark can conclude that it was neutral in World War II. In like circumstances with regard to Palestine which the Selective Service System designated as neutral, judicial intervention was held warranted to reach the conclusion that the country was improperly so classified. *Petition of Ajlouny*, 77 F. Supp. 327 (E.D. Mich. 1948). In addition, the determination of the Selective Service System that Denmark was a neutral nation was not in the exercise of a function of foreign affairs, but rather it was a determination interpreting its own regulations as to the liability of an alien resident of the United States to service in the armed forces. Hence, the issue of Denmark's neutrality for the purposes of the present petition is not strictly a political issue. Cf. *Shachtman* v. *Dulles*, 225 F. 2d 938, 940 (C.A.D.C. 1955). The question whether the petitioner was a neutral alien would therefore be as justiciable as the question whether he would have been a resident alien. *McGrath* v. *Kristensen*, 340 U.S. 162 (1950) or whether an agency complied with its regulations.

Conclusion

In view of the conflict between the instant case and *Moser* v. *United States*, 341 U.S. 41; in view of the fact that the present case presents the same issue as *Ceballos* v. *Shaughnessy*, No. 71, October 1956 Term; in view of the important issue of pleadings and practice involved herein in denying the petitioner an opportunity to fully perfect his case in the District Court, and in view of the rulings below refusing judicial review of asserted agency non-compliance with its own regulations, it is respectfully submitted that certiorari should be granted.

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APPENDIX A

Statutes and Regulations Involved

Section 3(a), Selective Training and Service Act of 1940, as amended, 54 Stat. 885 (1940), as amended, 50 U.S.C. App. § 303(a) (1946) provides in part:

> Except as otherwise provided in this Act, every * * * male * * * person residing in the United States who is between the ages of eighteen and forty-five * * * shall be liable for training and service in the land or naval forces of the United States: Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

Section 13(c), Immigration Act of 1924, as amended, 43 Stat. 161 (1924), as amended, 8 U.S.C. § 213(c) (1946) provides in part:

> No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant * * *, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant * * *, or (3) is not an immigrant as defined in section 203 of this title.

Section 28(c) of the Immigration Act of 1924, as amended October 29, 1945 (43 Stat. 168; 59 Stat. 551; 8 U.S.C. 224 c) provided:

> "The term 'ineligible to citizenship' when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United

States under sections 703 and 706 of this title, or section 303(a) of Appendix to Title 50, or under any law amendatory of, supplementary to, or in substitution for any such sections. . . ."

Section 315 of the Immigration and Nationality Act effective December 24, 1952 (66 Stat. 242; 8 U.S.C. 1426) provides in part:

"(a) Notwithstanding the provisions of section 405 (b) any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

32 C.F.R. 601.2 [Cum. Supp., 1944 Ed., 6 F.R. 6825; 7 F.R. 10802] provided:

"(c) The term 'citizen or subject of a neutral country' is used to designate any alien except (1) a citizen or subject of a cobelligerent country or (2) an alien enemy.

(d) The term 'cobelligerent country' means any country at war with a country against which the United States has declared war.

(e) The term 'alien enemy' means a citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States."

32 C.F.R. 622.43(b) [Cum. Supp., 1944 Ed.] provided:

"When an alien registrant who is a citizen or subject of a neutral country * * * prior to his induction into the land or naval forces of the United States files with his local board an original and one copy of an Application by Alien for Relief from Military Service (Form 301) * * * he shall be placed in Class IV-C; * * *.

APPENDIX B

RULING FROM THE BENCH BY THE HON. ALEXANDER HOLTZOFF, JUDGE, ON MOTION FOR DECLARATORY JUDGMENT

Washington, D.C., Thursday, May 14, 1953

Robert I. Thiel, Official Reporter

The Court: The Court has had considerable hesitancy and reluctance in attempting to determine the merits of this litigation, because subsequent to the time when it was instituted the Supreme Court held that an action for a declaratory judgment will not lie to determine the validity of an order of deportation.

The Court upon reflection, however, determined to keep this case and decide it on the merits in view of the fact that after it was dismissed in this Court it was remanded by the Court of Appeals for trial. Even though that order of remand was made on consent, nevertheless, the Court is inclined to view that it is binding on this Court and constitutes the law of the case.

This brings us to the real question at issue. The plaintiff made a claim for exemption from Selective Service as a citizen of a country alleged to be neutral in World War II, namely, Denmark. The Selective Service Act permitted citizens of neutral countries to make a claim for deferment on the ground that they were such citizens. The Selective Service Act provided, however, that a person who makes such a claim ceases to be eligible for naturalization.

The plaintiff's deportation has been ordered on the ground that by making the foregoing claim he became ineligible to citizenship and thereby ineligible to remain in the United States as a permanent resident.

It is claimed by the plaintiff that Denmark was not in fact a neutral country but for some purposes it was an enemy country and for others an allied and associated power, thus being in a somewhat anomalous state.

The Government claims that the Court may not review this point in view of the fact that it was not raised before the Immigration authorities.

The pretrial memorandum clearly indicates, however, that this issue was raised by the plaintiff at pretrial, that it was met by the defendant at pretrial and that no contention was made that the issue was not available or open. The Court is bound by the pretrial order, and therefore, the conclusion necessarily follows that this issue is open for decision.

Ordinarily, the question whether a foreign power is a neutral or not is a political question to be determined by the President of the United States or the Secretary of State. In this instance, however, the State Department has failed to make a determination of this question. In fact, the conclusion seem inescapable that the State Department carefully and deliberately refrained from making an open declaration on the question whether Denmark should be or should not be regarded as a neutral. For the purposes of the Trading-With-the-Enemy Act Denmark was regarded as an enemy country.

Since the Executive Branch of the Government has not made a formal declaration or a formal decision on this question, which may be deemed to be a political one, the Court has to decide it as a question of fact, and it must do so as it would determine any other fact presented to it for decision.

The parties have stipulated the evidentiary facts on the basis of which the Court may make its decision. The Court reaches the conclusion, on the basis of the stipulated facts, that Denmark was not a neutral country. If it was not a neutral country, it necessarily follows that the provision of the Selective Service Act on which the Government relies for depriving the plaintiff of eligibility for citizenship is not applicable. It may well have been erroneous for the Selective Service authorities to grant the plaintiff's claim for exemption as a citizen of a neutral country, because he was a citizen of a country that was not neutral. But, be that as it may, the drastic penalty of loss of eligibility for citizenship may not attach to the plaintiff's claim of citizenship in a neutral country and to the grant of that claim of exemption, because in fact Denmark was not a neutral country.

In view of these circumstances, the Court will render judgment in favor of the plaintiff. You may present proposed findings of fact and conclusions of law, and proposed judgment.

* * * * * * *

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11928

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT,

v.

EINAR RASMUSSEN, APPELLEE.

Appeal from the United States District Court for the District of Columbia

Decided June 14, 1956

Mr. Harold H. Greene, Assistant United States Attorney, for appellant. *Messrs. Leo A. Rover*, United States Attorney at the time of argument, and *Lewis Carroll*, Assistant United States Attorney, were on the brief for appellant. *Mr. William J. Peck*, Assistant United States Attorney at the time record was filed, also entered an appearance for appellant.

Mr. David Carliner for appellee. *Messrs. Jack Wasserman* and *Irving Tranen* were on the brief for appellee.

Before EDGERTON, Chief Judge, and FAHY and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* Plaintiff-appellee obtained a declaratory judgment in the District Court that he "is not ineligible for citizenship upon the ground that he claimed exemption [from liability for service under the Selective Training and Service Act of 1940] as a neutral alien," and accordingly is not subject to deportation upon the ground that he entered the United States illegally.

When we previously heard this case, we were of the opinion that under *Heikkila* v. *Barber*, 345 U.S. 229 (1953), the District Court was without jurisdiction to review a deportation order other than in a habeas corpus proceeding. *Brownell* v. *Rasmussen*, 95 U.S. App. D.C. 260, 221 F.2d 541 (1955). In *Rasmussen* v. *Brownell*, 350 U.S. 806 (1955), the Supreme Court reversed without opinion, and remanded the case to us for consideration on the merits, to which we now proceed.

Appellee, an alien residing in this country, in 1943 filed an application for relief from liability from the draft in accordance with Section 3(a) of the Selective Training and Service Act of 1940, 54 STAT. 885 (1940), on the ground that he was a citizen of a neutral nation, Denmark. He was given deferred status. A few months later he offered himself for induction, but was rejected as physically unfit. The question before us is whether by his request for relief appellee became debarred from becoming a citizen of the United States, since if he did become debarred he is subject to deportation.[1] Appellee says that he is not debarred, for the reasons that (1) he was not entitled to relief from the draft because (so he contends) Denmark was not neutral at the time of his application, and (2) he was not in fact relieved from liability because of his application. We think appellee's contentions cannot be sustained.

Section 3(a) says in pertinent part that "every . . . male . . . person residing in the United States . . . shall be liable for training and service . . . Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if . . . he has made

[1] Appellee claims that since he was authorized to make voluntary departure in 1944, prior to the Act of October 29, 1945, 59 STAT. 551, that Act should not apply to his re-entry in 1946. But Section 13(c) of the Immigration Act of 1924, 43 STAT. 153, which the Act of October 29, 1945 amended, specifically makes admission to the United States the thing barred to those ineligible to citizenship, not voluntary departure, so that the 1945 Act clearly is applicable to the 1946 re-entry. Cases under the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 et seq. are inapposite, because the 1945 Act contains no counterpart to the Section 405 "savings clause" of the 1952 Act.

application to be relieved from such liability . . . but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

Since appellee was admittedly a male alien "residing" in this country, he was "liable for service" whether he was a citizen of an allied nation, a neutral nation, or an enemy nation, and remained liable whether or not he was called, or deferred for some reason unrelated to alienage.[2] He asked to be relieved from liability on the ground that he was a citizen or subject of a neutral country. This seems all that Section 3(a) requires: the "bar only comes into existence when an alien resident liable for service asks to be relieved." *McGrath* v. *Kristensen*, *supra* note 2, 340 U.S. at 172 (emphasis added). And as this court said in *Machado* v. *McGrath*, 90 U.S. App. D.C. 70, 74, 193 F. 2d 706, 710 (1951), cert. denied, 342 U.S. 948 (1952):

> "Citizens and subjects of a neutral country who apply for relief prior to induction need not serve in our armed services. But any person who asks for this relief is thereafter debarred from becoming a citizen of the

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[2] In McGrath v. Kristensen, 340 U.S. 162 (1950), the Supreme Court said, at page 172:

> "If Kristensen was not 'residing' at the time of his application for relief, he could not then have had 'such liability' for service. If there was no 'liability' for service, the disqualification for citizenship under the penalty clause could not arise because the applicant had not made the 'application' referred to in the statute as 'such application.' 'Such application' refers to an application to be relieved from 'such liability.' As there was no 'liability' for service, his act in applying for relief from a nonexistent duty could not create the bar against naturalization. By the terms of the statute, that bar only comes into existence when an alien resident liable for service asks to be relieved."

Unlike Kristensen, who was not liable for service under Section 3(a) because he was not a resident, appellee was liable. Under the Act, one may be liable though not called, or deferred or exempted. See, e.g., Section 4(a), 54 STAT. 887:

> "SEC. 4. (a) The selection of men for training and service under section 3 (other than those who are voluntarily inducted pursuant to this Act) shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted. . . ."

United States. Congress nowhere provided that the subsequent entrance of a neutral into the war, either with or without reclassification of its aliens, would remove the bar to citizenship previously incurred."

There is thus basis for concluding that a resident alien who applies for relief on the ground of neutral nationality is barred by the application, regardless of whether the country in question is in fact neutral. But we need not reach that point. We are convinced that in the instant case the ruling of the Director of Selective Service holding Denmark to be a neutral country for purposes of Section 3(a) is controlling, and cannot be collaterally attacked. The status of a foreign country for our domestic purposes is a political matter peculiarly within the control of the executive branch of the government. While it is true that determinations on foreign policy matters are normally delegated to the Secretary of State rather than other members of the executive branch, this is not necessarily so. Here the Director acted under the supervision of the President, who was of course charged with military as well as foreign policy responsibilities. In the absence of some repudiation by the President of the Director's determination regarding the status of Denmark and its nationals, we do not think the courts should entertain a collateral attack upon it. *Compare Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948).

We turn to appellee's contention that it is not his request for relief but whether in fact he was relieved because of neutral alienage, that is determinative. If appellee had not been relieved at all, but had in fact been impressed into service, there might be some weight to his argument. But here it is clear that appellant was in fact deferred shortly after making his application for relief. His complaint in the District Court contains no allegation that the deferment was based on anything other than his application.[3] The

[3] The complaint says that the plaintiff made the application for relief as a neutral, and adds "Plaintiff was thereafter classified IV-A." The Government's answer admits this allegation. Under the Selective Service regulations then in force, the "IV-A" classification was for persons to

case was not tried on any such basis, and it is only in this court that the suggestion is made that the deferment might have been based on something other than his application as a neutral. It is in fact no more than a suggestion—there is no definite offer to show that the deferment was actually based on another ground. Under the circumstances, we do not think we would be justified in remanding the case for a determination by the trial court of the ground of deferment.[4]

Appellee also contends that his application was the result of mistake. He said he believed, partly at least because of misinformation supplied by his draft board, that induction into the armed forces would not facilitate or authorize naturalization, and therefore he chose to seek relief from liability. But this is not the sort of mistake as to the nature of the application for relief from liability or its immediate consequences such as existed in *Moser* v. *United States*, 341 U.S. 41 (1951), or *Machado* v. *McGrath*, *supra*. Instead, as in *Mannerfrid* v. *United States*, 200 F. 2d 730, 733 (2d Cir. 1952), cert. denied, 345 U.S. 918 (1953), this is a case in which the alien, "although he knows that the claim [for relief from liability for service] will forfeit his right . . . is induced to make it because he is mistaken as to what will be the consequences of not making it. We concede that that would be no more than a further step

---

old to be called for service (over 45). See 7 FED.REG. 9607 (Nov. 20, 1942). The proper classification for aliens claiming relief as neutrals was "IV-C." But the complaint goes on to say that after plaintiff requested induction his "claim for exemption was no longer honored." This rather strongly implies that prior thereto the "claim"—evidently the application for relief—had been honored.

[4] The writer of this opinion would go further, and say that appellee is barred even though it is shown that his draft board purported to defer him for some reason other than his proffered application for relief as a neutral alien. Appellee should not now be allowed to disavow the legal consequences of his application. Congress intended that applications for relief duly filed by nationals of neutral countries should be honored: if any such application had not been honored, judicial intervention would no doubt have been available. A man deferred for neutral alienage, furthermore, had a much more secure status than one deferred for age, physical reasons, parenthood, or the like.

of the lenity that the Court exercised in *Moser* v. *United States*, supra, and that the difference is one of degree; but that is so often the determining factor in situations of this kind, that we need not support its propriety if the difference in degree be wide enough. We can say no more than that we do not believe that Congress would have tolerated the necessary laxity in this instance." We agree with the Second Circuit's conclusion concerning this issue. And our decision in *Machado* v. *McGrath*, *supra*, also makes it clear that appellee's action in offering himself for induction while the war was still going on does not overcome the effect of his earlier application for relief.

Accordingly, the judgment of the District Court must be reversed with instructions to enter judgment for appellant.

So ordered.

JUDGMENT—(Filed June 14, 1956)

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court with instructions to enter judgment for appellant.

Dated: June 14, 1956.

Per Circuit Judge Washington.

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No. 397 17

In the Supreme Court of the United States

OCTOBER TERM, 1956

EINAR RASMUSSEN, PETITIONER,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 399

EINAR RASMUSSEN, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 15-20; R. 47-53) is not yet reported. The ruling in the District Court (Pet. 13-15; R. 9-11) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956 (Pet. 20; R. 54). The issuance of a copy of its opinion and a certified copy of its judgment was stayed by the Court of Appeals pending disposition by this Court of *Ceballos* v. *Shaughnessy*, No. 71, this Term (certiorari granted, June 11, 1956, 351 U.S. 981)

or until further order (R. 55). The petition for a writ of certiorari was filed on September 10, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the determination of the Director of Selective Service that Denmark was a neutral country, for the purpose of exemption from military service under Section 3(a) of the Selective Training and Service Act of 1940, is subject to judicial review.

2. Whether the Court of Appeals erred in not remanding this case to the trial court for determination of whether the petitioner was actually deferred from military service on the basis of his claim for exemption as a neutral alien under Section 3(a) of the Selective Training and Service Act of 1940.

3. Whether petitioner's ineligibility for citizenship under Section 3(a) of the Selective Training and Service Act of 1940, which provides that a neutral alien who makes application for exemption from military service under its provisions is debarred from thereafter becoming a citizen, is voided by his reliance, in making the application for exemption, upon the erroneous advice of his draft board that an alien illegally in the United States could not become a citizen by serving in the Army.

STATUTES AND REGULATIONS INVOLVED

Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U.S.C. App. (1946 ed.) 303(a), provided in pertinent part:

> Sec. 3. (a) Except as otherwise provided in this Act, every * * * male person residing in the

United States, who is between the ages of eighteen and forty-five * * * shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

Section 10 of the Selective Training and Service Act of 1940, 54 Stat. 893, as amended, 57 Stat. 598 (1943), 50 U.S.C. App. (1946 ed.) 310(b), provided in pertinent part:

Sec. 10. * * *

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except section 9). The Director of Selective Service may delegate and provide for the delegation of any authority so delegated to him by the President * * * to such officers, agents, or persons as he may designate or appoint * * *.

Section 13(c) of the Immigration Act of 1924, 43 Stat. 162, as amended, 8 U.S.C. (1946 ed.) 213(c), provided in pertinent part:

Sec. 13. * * *

* * * * *

(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant * * *, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant * * *, or (3) is not an immigrant as defined in section 3.

Section 14 of the Immigration Act of 1924, 43 Stat. 162, as amended, 8 U.S.C. (1946 ed.) 214, provided in pertinent part:

Sec. 4. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States * * * shall be taken into custody and deported * * *.

Section 315(a) of the Immigration and Nationality Act of 1952, 66 Stat. 242, 8 U.S.C. 1426(a), provides:

Sec. 315. (a) Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

32 C.F.R. 601.2 (Cum. Supp., 1944 Ed.), 6 F.R. 6825, 7 F.R. 10802, provided:

* * * * *

(c) The term "citizen or subject of a neutral country" is used to designate an alien who is a

citizen or subject of a country which is neither a cobelligerent country nor an enemy country;

(d) The term "cobelligerent country" means any country at war with a country against which the United States has declared war.

(e) The term "alien enemy" means a citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States.

STATEMENT

Petitioner, a citizen and native of Denmark, instituted an action in the District Court for the District of Columbia to have himself adjudged eligible for citizenship and thus not deportable under the provisions of Section 13(c) and 14 of the Immigration Act of 1924 (*supra*, pp. 3-4) as an alien illegally in this country who at the time of his last entry was inadmissible because of his ineligibility for citizenship.

Petitioner's ineligibility for citizenship is grounded upon his execution on April 26, 1943, of a selective service form, D.S.S. Form 301 (R. 1), which was an application for relief from military service as a national of a neutral country under the provisions of Section 3(a) of the Selective Training and Service Act of 1940 (*supra*, pp. 2-3), which provided that the filing of such an application by a neutral alien debarred the applicant from thereafter becoming a citizen of the United States.

Petitioner's complaint alleged that, after filing this application, he was given a deferred status and thereafter classified 4A (over-age) (R. 1). The complaint does not allege that he misunderstood the consequence

of signing the application (R. 1-3). However, his attorney explained to the District Court at the hearing on this action that petitioner had told his draft board before making the application that—"I am an alien illegally in the United States; if I can become a citizen, I want to go into the Army, if I can't become a citizen, I don't want to go into the Army" (R. 25); and his draft board had told him that an alien illegally in the United States could not become a citizen by joining the Army (R. 26). Approximately six months after filing the application, in October of 1943, petitioner discovered that service overseas would permit an alien illegally in this country to become a citizen (R. 26). He accordingly submitted a request for withdrawal of Form 301 and induction into the United States armed forces (R. 2). Thereafter, his claim for exemption was no longer honored. He was called for induction, and rejected for defective vision (R. 2).

Deportation proceedings were instituted against petitioner; and on March 30, 1944, he was granted permission to adjust his status through preexamination and voluntary departure (R. 2). On January 16, 1946, he reentered through Canada and was admitted for permanent residence (R. 2).

The present deportation proceedings were instituted in 1947 on the ground that petitioner's application for exemption from military service as a national of a neutral country rendered him ineligible for citizenship under Section 3(a) of the 1940 Act at the time of his last entry, and that fact made his 1946 entry illegal (R. 2).

The District Court found that petitioner was not ineligible for citizenship, based solely on its conclusion that

Denmark was, in fact, not a neutral country (R. 10-11).[1] The District Court noted that ordinarily the neutrality of a foreign power was a political question to be determined by the President or the Secretary of State, but ruled that in this case the executive branch of the government had not made a formal determination (R. 10-11). The Court of Appeals, in reversing, held that the Director of Selective Service acted under the supervision of the President in making the determination that Denmark was neutral, and therefore the courts should not entertain a collateral attack on that determination (Pet. 18).

In answer to petitioner's contention that the determinative factor in creating ineligibility under Section 3(a) of the 1940 Act was not the making of the application for exemption but the granting of the relief, the Court of Appeals noted that his complaint before the District Court did not allege that the deferment was based on anything other than his application; the case was not tried on such a basis; and there was no definite offer to show that the deferment was actually based on another ground (Pet. 18-19). Under those circumstances, the court held that there was no justification for remanding the case to the District Court for a determination of the ground of deferment (Pet. 19). However, the Court of Appeals has stayed the issuance of a copy of its judgment pending disposition by this Court of *Ceballos* v. *Shaughnessy*, No. 71, this Term, certiorari granted, June 11, 1956, 351 U.S. 981, or until further order (R. 55). The question raised in the petition for a writ of certiorari in *Ceballos* is whether ineligibility for citizenship under Section 3(a) of the

[1] This issue had not been raised before the administrative agencies which ruled that petitioner was deportable (R. 41).

Selective Training and Service Act of 1940 results from the alien's act of claiming exemption from military service or whether there must also be evidence of formal recognition of the claim.

The Court of Appeals further held that the misinformation given petitioner by his draft board, as to whether his induction would facilitate or authorize his naturalization, was not the sort of mistake as to the nature of an application for relief from liability or its immediate consequences which led this Court in *Moser* v. *United States*, 341 U.S. 41, to declare that Moser's application did not render him ineligible for citizenship (Pet. 19-20).

ARGUMENT

1. Petitioner challenges (Pet. 8-9) the holding of the court below that the determination by the Director of Selective Service that Denmark was a neutral country for the purpose of Section 3(a) of the Selective Training and Service Act (*supra*, pp. 2-3) is controlling on the courts and cannot be collaterally attacked (Pet. 18). The decision below on this issue is in accord with that of the Ninth Circuit in *Bussoz* v. *United States*, 218 F. 2d 683, 686-687, certiorari denied, 350 U.S. 824. It follows the well-established principle that the courts will not interfere with decisions of the political branch of the government concerning matters of foreign policy. See *e.g.*, *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111-113; *United States* v. *Belmont*, 301 U.S. 324, 330; *United States* v. *Curtiss-Wright Corporation*, 299 U.S. 304, 315-322; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302; *Jones* v. *United States*, 137 U.S. 202, 212. The belligerent status of an occupied country during World War II is just such a political question, the determination of

which by the executive branch of the government should be accepted by the courts.

Both the District Court and petitioner's attorney, in arguing before it, apparently agreed that a decision on this question by the executive branch of the government should bind the courts, but refused to recognize that any one other than the President or the Secretary of State could so act (see *e.g.*, R. 10-11, 27, 38-39). In determinations involving the Selective Training and Service Act of 1940, however, Congress expressly, in Section 10 of the Act (*supra*, p. 3), authorized the President to delegate his authority to the Director of Selective Service. Thus, the Director was acting on behalf of the Executive, and specifically on behalf of the President, when he made his determination of Denmark's neutrality. *Bassoz* v. *United States*, 218 F. 2d 683, 686-687 (C.A. 9) certiorari denied, 350 U.S. 824. That determination by the Director should therefore be honored by the courts in the same way as any other determination of a political question by the executive branch. Cf. *Bingman* v. *United States*, 156 F. 2d 148, 150 (C.A. 9), certiorari denied, 329 U.S. 720, and *Poodenko* v. *United States*, 147 F. 2d 752 (C.A. 10), certiorari denied, 324 U.S. 860.

Even if the determination of neutrality were reviewable, however, there is no basis for overruling that made by the Director of Selective Service. Petitioner himself claimed exemption from military service on the basis of Denmark's neutrality. And it is a matter of public knowledge and record that the territory of Denmark was occupied by the German armed forces in less than a day; that Denmark never declared war on either the United States and its allies or on Germany and its allies; and that none of the belligerent powers declared

war on it. Under these circumstances, the determination that Denmark was neutral cannot be said to be either arbitrary or capricious.

That the neutrality of Denmark may have been viewed differently for other purposes (such as with respect to the Trading with the Enemy Act and the military government of Germany, mentioned by petitioner (Pet. 8)[2]) does not warrant the conclusion that the Director was wrong in his determination that it was neutral for the purpose of granting exemptions to resident aliens under the Selective Training and Service Act. The concept of "neutrality," like the concept of "residence," need not necessarily be the same for all purposes. For example, the regulation by the Director of Selective Service that aliens who have resided in this country more than three months shall be deemed "resident" aliens, unless they apply for determination of status, has been upheld as applied to an alien admitted as a business visitor, against the claim that in many other aspects he is not deemed a "resident." *Mannerfrid* v. *United States*, 200 F. 2d 730 (C.A. 2), certiorari denied, 345 U.S. 918.

Petitioner also attempts to justify court review of the political question of Denmark's neutrality by restyling it as merely a question of whether the Selective Service System complied with its own regulations when it made its determination (Pet. 8-9). These regulations, 32 C.F.R. 601.2 (*supra*, pp. 4-5), required the Director to determine whether petitioner was a neutral alien under a definition defining a neutral alien as any alien except a citizen or subject of a "cobelligerent country" or an "alien enemy," which terms are also defined. The

[2] Petitioner concedes that the Department of State apparently took no position on the issue of Denmark's status.

Director made his determination within these general definitions, based upon valid grounds, as we have pointed out, *supra*, pp. 9-10. The application of the regulations was, therefore, neither arbitrary nor capricious.

2. Petitioner seeks review of the decision below that his case should not be remanded for a determination of the actual grounds for his deferment from military service (Pet. 7-8). While the Court of Appeals found that the complaint, read as a whole, did not show that petitioner was claiming that he had not received deferment as a neutral alien, it nevertheless stayed issuance of a certified copy of its opinion until further order, or until this Court reaches a decision in *Ceballos* v. *Shaughnessy*, No. 71, this Term, as to whether the mere claiming of exemption from military service as a neutral alien creates a bar to citizenship under Section 3(a) of the Selective Training and Service Act of 1940, or whether, in addition, there must be evidence of formal recognition of the claim (R. 55). This Court may therefore wish to defer consideration of the petition, on this issue, until the disposition of *Ceballos*.

3. Petitioner also contends that he filed his application for exemption from military service under the same type of mistaken advice which led this Court in *Moser* v. *United States*, 341 U.S. 41, 47, to hold that the alien there involved did not make an intelligent waiver of citizenship under Section 3(a) of the Selective Training and Service Act of 1940 (Pet. 5-7), and was not debarred from citizenship. A comparison of the circumstances under which Moser and petitioner made their applications refutes this contention.

The alleged mistaken advice given to petitioner was by a local draft board official who told him that service

in the army would not facilitate his becoming a citizen (R. 26). Petitioner does not allege that he elected to make the application for exemption with any misconceptions as to the fact that to do so would forever bar him from becoming a citizen.

The mistaken advice given to Moser was by the Swiss Consulate (upon the advice of the Department of State) which assured him that he would not be debarred from becoming a citizen by making application for exemption on Revised Form D.D.S. 301, which revision, made by special arrangement of the Department of State with the Selective Service System to give recognition to certain treaty rights of Swiss nationals, did not contain a stipulation that the application would debar the applicant from becoming a citizen, as did Form 301 signed by petitioner. 341 U.S. at 43-45. Moser, unlike petitioner, filed the application in the belief that he would not be barred from becoming a citizen. 341 U.S. at 46-47.

Under these dissimilar factual circumstances, the decision below cannot be said to conflict with that in *Moser*. Rather, it is in accord with the Second Circuit in *Mannerfrid* v. *United States*, 200 F. 2d 730, 732-733, certiorari denied, 345 U.S. 918, which held that a collateral mistake as to the consequences of not making an application for exemption from military service did not come within the *Moser* rule.

Congress evinced a clear purpose in Section 3(a) of the 1940 Act to bar from citizenship those aliens from neutral countries who did not choose to fight for this country. It would be inconsistent with that objective to hold that one who knew he was waiving his rights to citizenship when he filed his application for exemption was nevertheless not debarred from citizenship in spite

of the statute, because he was misinformed as to the consequences of *not* making the application.

CONCLUSION

The Court may wish to defer consideration of the issue already pending in *Ceballos* v. *Shaughnessy*, No. 71, this Term, until the disposition of that case. As to the other issues raised by petitioner, the decision below is in accord with well-established principles of law and presents no conflict or inconsistency with a decision of this Court or of other circuits. On those issues, certiorari should be denied regardless of the disposition of *Ceballos*.

Respectfully submitted,

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OCTOBER 1956.

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